SUPREME COURT, U.S.
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NO. 80-387

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HARDING, DAHM & COMPANY, INC.,
Petitioner,

versus

RUDY LIGHTSEY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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REASONS FOR DENYING WRIT

The Writ should be denied because Petitioner's Questions Presented for Review and Reasons for Granting the Writ raise issues which were neither raised below nor considered by the Court of Appeals and this Court does not ordinarily review issues neither raised nor briefed below.

Furthermore, the Petition fails to allege or disclose any conflict between the ruling of the Court of Appeals and another court of appeals on the same matter, nor has Petitioner shown that the decision is in conflict with applicable state law; although contending certain statutory implications, the Petition fails to disclose any state law or cases in conflict with the Court of Appeals decision. Nor has Petitioner presented any other valid or cogent reason why this case is important enough for review by this Court.

Also, the doctrines of full faith and credit and comity are inapplicable to the case herein until it can be shown that the Indiana Real Estate Commission had jurisdiction to decide the contractual issues, a point which was decided adversely to Petitioner by the Court of Appeals. The Court of Appeals decision was correct and should not be disturbed.

A.

The issues of full faith and credit and comity presented herein by Petitioner were neither raised, discussed, nor briefed by the parties below, and obviously were not considered by the Court of Appeals. Such issues should not be raised for the first time at the Supreme Court level. *Tyrrell v. District of Columbia*, 243 U.S. 1; *Adickes v. Kress & Co.*, 398 U.S. 144, 147, Note 2. Petitioner is attempting to raise issues and arguments that were not passed on below, and the Court should not permit such questions to be heard for the first time at the Supreme Court level.

B.

The Petition does not allege or disclose any conflict between the decision of the Court of Appeals and any other court of appeals on the same matter.

C.

Petitioner has attempted, by some extremely strained statutory construction, to show that the Court of Appeals decision conflicts with alleged state law. Petitioner's statutory constructions are more the product of wishful thinking than of sound legal reasoning and Petitioner has cited no cases or statutes in support of its position.

D.

The case is of very limited significance other than to the actual litigants, because of the finding by the Court of Appeals that the Indiana Real Estate Commission had no jurisdiction to determine the contract issues. The case would be of much greater significance if the issue below had not been jurisdiction. By reason of lack of jurisdiction, the matter assumes significance to the litigants only, and not to the real estate industry as a whole, and does not require a Supreme Court definition of the role of real estate commissions and/or the courts in grievance procedures.

E.

The Court of Appeals decision is clearly correct. The issue on a grievance is ethical conduct, not contract issues. The Real Estate Commission is clearly without statutory authority to determine contract issues, contractual rights being for a court of law. Petitioner could have complied "with its ethical and professional duties to the seller, but still be in breach of its contract with Lightsey" (Petitioner's Appendix 1, page 5a).

F.

Petitioner's full faith and credit argument overlooks and ignores a most basic and elemental point of law, to wit: no judicial or administrative decision can have any effect whatsoever where such court or administrative agency does not have jurisdiction to decide the issue in question. *Bowen v. United States*, 570 F.2d 1311, 1322 (7th Cir. 1978). The Court of Appeals determined that the Indiana Real Estate Commission had no such jurisdiction (Petitioner's Appendix 1, page 6a); therefore, full faith

and credit is irrelevant until Petitioner can first show jurisdictional authority in the Real Estate Commission. Full faith and credit is not the issue at all, the issue is jurisdiction, and without jurisdiction, threre can be no full faith and credit.

Petitioner's statement on page 11 of its Brief that "full faith and credit does not allow the Court of Appeals to reverse the Trial Court on the ground of lack of jurisdiction" is absolutely ludicrous. A judgment void is of no force or effect.

Briefly, as stated in the Court of Appeals decision, "We find that the Indiana Real Estate Commission had no statutory authority to determine the issue presented in appellant's suit. We therefore hold that its finding that Harding, Dahm acted in accordance with the contract is not entitled to preclusive effect" (Petitioner's Appendix 1, page 4a).

No judicial or administrative decision can have any effect where such court or administrative agency had no jurisdiction to decide the question in issue. *Bowen v. United States*, 570 F.2d 1311 (1978). Petitioner cites *Bowen*, but in *Bowen* it was held that the matter was properly before the National Transportation Safety Board. Here the Court of Appeals held the contract issues were not before the Real Estate Commission.

Petitioner overlooks the fact that the issue before the Real Estate Commission was ethical conduct and not contract construction, and that the contract can be violated without ethical restraints being violated (Petitioner's Appendix 1, page 5a).

In *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183 (1941), it was noted that *valid* judgments are subject to full faith and credit (emphasis added).

Petitioner's strained construction of Indiana Code §25-34-1-16 is clearly dealt with by the Court of Appeals (Petitoner's Appendix 1, page 4a). The Court of Appeals decided the matter adversely to Petitioner and Petitioner is seeking to rehash old matters before this Court. The issue is not entitlement to money but ethical conduct.

The jurisdictional aspect of the matter before the Indiana Real Estate Commission would be analogous to disciplinary proceedings before a Bar Association. A finding of ethical misconduct on the part of an attorney by a Bar Association certainly does not entitle the aggrieved person to a judgment against such lawyer in a court of law, the theory being that the issue before the Bar would be standard of conduct and the issue in court something else.

On page 17 of its Brief, Petitioner attempts to show that the Real Estate Commission *should have* jurisdiction because "a judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under law supposed ready to exist". Such characterization of the Real Estate Commission is unfounded because Petitioner has put forth no statutory authority for the proposition that the Real Estate Commission can enforce liabilities. The Real Estate Commission's powers are limited solely to deny, refuse to renew, revoke or suspend any license issued. Indiana Code §25-34-1-16.

Despite Petitioner's characterizations of the Court of Appeals decision as being clearly erroneous and freewheeling (page 18, Petitioner's Brief), nowhere in Petitioner's Brief has it cited any cases or statutes supporting its proposition that the Indiana Real Estate Commission had the authority to determine the validity of contracts, nor has Petitioner cited any authority for its position that

a determination of contract validity is necessary and vital in this case.

Petitioner's comity argument has no more validity than its full faith and credit argument under the facts and decisions of the Court of Appeals herein. Petitioner's assertions as to the jurisdiction of the Indiana Real Estate Commission are unsupported by any cases or statutes and appear to be the mere conclusions or wishful thinking of Petitioner.

Petitioner has relied on certain cases cited on page 19 of its Brief, to support the proposition that the Federal courts have extended the doctrine of comity so as to place more reliance upon the role of state tribunals in interpreting both Federal and state law. While Petitioner's abovementioned statement does have some validity, each and every case cited by Petitioner is founded upon or related to a state *criminal* prosecution, wherein the issue of jurisdiction of the Federal court to enjoin the state proceeding was involved, which issue was not at all involved in this case. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 43 L.Ed. 2d 482 (1975); *Beal v. Missouri Pacific R. Corp.*, 85 L.Ed. 577, 312 U.S. 45 (1941); *Younger v. Harris*, 401 U.S. 37, 27 L.Ed. 2d 669 (1971); *Francis v. Henderson*, 425 U.S. 536, 48 L.Ed. 2d 149 (1976).

Petitioner carries forward its erroneous assertion that the Commission was directed by statute to determine whether monies were properly remitted, when in fact, as pointed out hereinabove, the Commission was directed to determine if license laws were violated, which, as the Court of Appeals said, does not include contract construction (Petitioner's Appendix 1, page 5a). Petitioner also confuses the role of the Real Estate Commission in regulating the real estate industry. Clearly, its regulatory

powers concern conduct, and not contract construction.

Furthermore, Petitioner's quotation from *Beal v. Missouri Pacific R. Corp.*, cited on page 20 of its Brief, is incomplete and taken out of context. The actual quote, at 312 U.S. 50, is as follows:

> "*And in the exercise of the sound discretion which guides the determination of courts of equity*, scrupulous regard must be had for the rightful independence of state governments and a remedy infringing that independence which might otherwise be given should be withheld if sought on slight or inconsequential grounds." (Emphasis added.)

The District Court herein was not sitting as a court of equity, nor did the Court of Appeals rule on slight or inconsequential grounds. Indeed, the decision of the Court of Appeals is grounded in the most basic of legal principles, to wit: lack of jurisdiction, which can never be held to be slight or inconsequential grounds.

It is also noted that in its opinion, on page 4 thereof, the Court of Appeals noted that the District Court ruled, "without citing any support, ..." The Petitioner has not been able to supply the District Court or the Court of Appeals, nor this Court, with any support, statutory or case law, for its position, or to show why the Court of Appeals was in error.

The Seventh Circuit Court of Appeals in *Bowen, supra*, at 1322, noted that,

> "At the same time, however, there is an increasing recognition that the rules of issue preclusion should not be inexhorably applied when a fair opportunity to litigate the issue in the prior proceeding was lacking."
>
> "Here the underlying policy, viz., that one fair opportunity to litigate an issue is enough, is best

served by the rule that issue preclusion applies to a final administrative determination of an issue properly before an agency acting in judicial capacity *when both parties were aware of the possible significance of the issue in later proceedings* and were afforded a fair opportunity to litigate the issue and obtain judicial review." *Bowen, supra,* at page 1322.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the Petitioner herein with a copy of the within and foregoing Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, by placing a true and correct copy thereof in the United States Mail, postage prepaid, addressed to:

George Martin, Esquire
J. Philip Burt, Esquire
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This 9 day of December, 1980.

LEVINE AND KRELL, P.C.

DAVID N. LEVINE